IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

ARBITRATION PETITION NO.356 OF 2005

Ion Exchange (India) Ltd.
a Company registered under the
Companies Act,1956 having its
registered office at Tiecicon
House, Dr.E.Moses Road,
Mahalaxmi, Mumbai-400011. ...Petitioner

vs.

Paramount Limited.
Paramount Complex, Gotri Road,
Race Course, Baroda-390007. ...Respondent

Dr.V.V.Tulzapurkar with K.D.Parikh, V.Y.Divekar i/b. Divekar & Co., for Petitioner.

Mr.Pradip Sancheti with Sanjay Jain i/b. Vinod Mistry & Co., for Respondent.

CORAM: D.K.DESHMUKH,J.

DATED: 5th June, 2006.

ORAL JUDGMENT

1. By this petition, the petitioner challenges the Award made by the Arbitrator directing the petitioner to pay certain amounts to the respondent. An objection to the maintainability of the petition before this Court is raised by the respondent. The

objection raised by the respondent is that after the Award was made on 5.5.2005, an application under Section 9 of the Arbitration & Conciliation Act was filed by the respondent in a Court at Baroda and therefore, in view of the provisions of Section 42 of the Arbitration and Conciliation Act,1996, this petition will not be maintainable before this Court. It is submitted that Section 42 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the Act) lays down that with respect to the arbitration agreement if any application under part-I of the Act has been made in the Court, that Court alone shall have jurisdiction over the arbitral proceedings and all subsequent applications arising out of that agreement and the Arbitral proceedings shall be made in that Court. It is submitted that an application made under Section 9 of the Act is an application made with respect to the arbitration agreement pursuant to which the Award which is challenged in the petition has been made under part I of the Act, and therefore, it is only the Court at Baroda which will have jurisdiction to entertain the application filed under Section 34 of the Act,

subsequent to the filing of application under Section 9 of the Act. The present petition was filed by the petitioner in this Court on 29.6.2005 and therefore, the present petition is the subsequent application and therefore, this Court will not have jurisdiction to entertain this application. It is further submitted that the petition is not maintainable in the Court because for the purpose of this petition this Court is not the Court within the meaning of the Act. It is submitted that in view of the definition of the term “Court” found in the Act a petition under Section 34 of the Act can be filed only before the Court which could have had the jurisdiction to entertain a suit on the same subject matter had a suit been filed instead of taking out arbitral proceedings. In the present case no part of cause of action in relation to the subject matter of the dispute between the parties has arisen within the jurisdiction of this Court. Therefore, had the petitioner filed Civil suit instead of taking out arbitral proceedings, the suit could not have been entertained by this Court.

2. In reply, it is submitted on behalf of the petitioner that the provisions of Section 42 of the Act will not operate to oust the jurisdiction of this Court to entertain this petition because of the filing of the application under Section 9 of the Act by the respondent before the Baroda Court, firstly because the application made under Section 9 of the Act before the Baroda Court by the respondent was not a bonafide application and the application contemplated by Section 42 of the Act is a bonafide application. It is submitted that as a result of the decision of the Division Bench of this Court in the case of "HMP Engineers Ltd. & others Vs. Ralies India Ltd. and others, 2003(4) Mh.L.J. 931" the provisions of Section 4 to 24 of the Limitation Act do not have application to an application under section 34 of the Act. Therefore, if an application is not filed within the period of limitation provided by section 34 of the Act, the remedy of filing an application under Section 34 of the Act challenging the Award is permanently denied to the person who feels aggrieved by the Award. In the submission of the petitioner, therefore, an application to be

termed as bonafide application for the purpose of Section 42 of the Act would be an application of which the petitioner has received notice before the expiry of the period of limitation fixed by Section 34 of the Act. It is submitted that in the present case, the Award was made on 31.3.2005. It was communicated on 6.4.2005. An application under Section 9 of the Act was filed by the respondent before the Baroda Court on 5.5.2005. The last date of limitation according to Section 34 of the Act for filing petition under Section 34 of the Act was 7.7.2005. But according to the petitioner, the notice of having filed petition under section 9 before the Baroda Court was served on the petitioner on 20.7.2005. Though, according to the respondent, the date of service of notice is not 20.7.2005 but 14.7.2005, but it is an admitted position that the service of notice about the filing of application under section 9 of the Act by the respondent before the Baroda Court was served on the petitioner after expiry of period of limitation fixed by Section 34 of the Act. According to the petitioner, in view of the fact that the provisions of Section 4 to 24 of the

Limitation Act are not applicable to the petition filed under Section 34 of the Act, Section 42 of the Act may be so read as to oblige the respondent to intimate the petitioner about the filing of application under Section 9 of the Act after the Award is made, immediately on filing the application so that the petitioner can arrange his business accordingly and can file his petition before that Court where application under Section 9 of the Act has been filed or take an informed decision about the Court in which he wants to file petition under Section 34 of the Act. It is submitted that otherwise the petitioner would be rendered remedyless for no fault of his because if this Court does not have jurisdiction because of filing of application under Section 9 of the Act before the Baroda Court then the petitioner cannot go to the Baroda Court because the period of limitation is over and the provisions of the Limitation Act relating to exclusion of time are not applicable. It is further submitted that the application made by the respondent before the Baroda Court is not a previous application contemplated by section 42 of the Act. Even before

the Award was made, the petitioner had moved an application under Section 11 of the Act before this court in relation to the constitution of Arbitral Tribunal. Relying on a judgment of the Constitution Bench of the Supreme Court in the case of “M/s.S.B.P. & Co. Vs. M/s.Patel Engineering Ltd. and anr. 2005(9) Scale 1” it is submitted that the Chief Justice before whom the application under Section 11 of the Act is made is a Court for the purpose of Section 42 of the Act and therefore, as the application under Section 11 of the Act was filed before the Chief Justice of this Court, it is this Court which will have jurisdiction to entertain the petition filed under Section 34 of the Act. It is further submitted on behalf of the petitioner that the application filed by the respondent under Section 9 of the Act at Baroda cannot be taken as the previous application for the purpose of Section 42 of the Act because the application filed under Section 9 of the Act by the respondent was an application filed after the Award was made and therefore, it cannot be termed as an application made with respect to the arbitration agreement. Relying on the judgment of the Supreme

Court in the case of “Kamal Pushpa Enterprises Vs. D.R.Construction Company, AIR 2000 Supreme Court 2676” it is submitted that an application made for enforcement of the Award is an application made not for enforcement of the Contract but it is for enforcement of the Award and therefore, the application made by the respondent under Section 9 of the Act before the Baroda Court seeking direction from the Court to the petitioner to deposit the amount in relation to which the Award is made is an application for enforcement of the Award and it is not an application with respect to the arbitration agreement. It is further submitted that it is clear from the definition of the term “Court” found in the Act that the Court which could have entertained a suit on the subject matter of arbitration is the Court which can entertain a petition under Section 34 of the Act. It is submitted that the petitioner carries on business within the jurisdiction of this Court therefore, had the respondent instead of making reference to arbitrator, filed a Civil suit, then this Court would have had the jurisdiction to entertain the suit under Order 12 of the Letters

Patent because the petitioner who would have been defendant in the suit carries on business within the jurisdiction of this Court.

3. The petitioner is challenging the validity of the Award on merits. It is submitted by the petitioner that the learned Arbitrator who made the Award had no jurisdiction to make the Award. It is submitted that the appointment of the arbitrator is contrary to the agreement between the parties and the law. It is submitted that the Arbitration clause between the parties contemplates appointment of one arbitrator by each of the parties and the two arbitrators appointing an Umpire. The arbitration clause provides for the arbitrator appointed by one of the parties becoming sole arbitrator on failure of the other party to appoint his arbitrator. It is submitted that there is no time limit fixed by the arbitration clause for the other party to make appointment of the arbitrator after one party has appointed his arbitrator. It is submitted that at no point of time, the petitioner was informed by the

respondent that if the petitioner does not make appointment of his arbitrator within the time stipulated in the notice, the arbitrator appointed by the respondent would become the sole arbitrator. It is submitted that as the arbitration clause does not specify any time limit for the other party to nominate his nominee and therefore, the appointment is to be made by the other party within a reasonable time. In the submission of the petitioner, the party which appoints the arbitrator first will have to stipulate the time which according to that party is a reasonable time for the other party to make appointment of his arbitrator and state in that letter itself that if the other party fails to make the appointment within the stated time, it will be treated as his failure to appoint the second arbitrator and the arbitrator appointed by the first party will become, as agreed, the sole arbitrator. The respondent without fixing any time which according to him would be reasonable time cannot say that the arbitrator appointed by him is entitled to act as sole arbitrator. It is further submitted that in view of the provisions of

Section 11 of the Act, now if one party fails to appoint its nominee on the arbitral tribunal, it is only the judicial authority under Section 11 of the Act which can make appointment and therefore, the Award made by the sole Arbitrator is illegal.

4. For the purpose of deciding the objection raised to the maintainability of this petition before this Court by the respondent, first the provisions of Section 42 of the Act have to be seen. Section 42 of the Act reads as under:-

> “42. Jurisdiction
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> Notwithstanding anything contained elsewhere in this Part or in any other law for the time being in force, where with respect to an arbitration agreement any application under this Part has been made in a Court, that Court alone shall have jurisdiction over the arbitral proceedings and all subsequent applications arising out of that agreement and the arbitral proceedings

> shall be made in that Court and in no other Court."

Perusal of the above quoted provision shows that in order to attract the provisions of Section 42 of the Act, the first application should be an application made to a Court. The term "Court" is defined by Section 2(e) of the Act which reads as under:-

> "2(e) "court" means the principal civil court of original jurisdiction in a district, and includes the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject-matter of the arbitration if the same had been the subject-matter of a suit, but does not include any civil court of a grade inferior to such principal Civil Court, or any Court of Small Causes;"

According to the respondent before this petition was filed in this Court the respondent had filed an

application under Section 9 which is in part I of the Act. Hence, all subsequent applications can be filed before the Baroda Court where the first application under Section 9 of the Act was filed. According to the petitioner, the application made by them under Section 11 of the Act was filed even before the award was made and that application was made to this Court therefore, the application filed by the respondent before the Baroda Court after the award was made will not bar them from filing present petition before this Court. In support of the submission that Judicial authority to whom application under Section 11 of the Act is made is a Court within the meaning of Section 2(e) of the Act, the petitioner relies on the Judgment of the Supreme Court in the case “M/s.S.B.P. & Co. Vs. M/s.Patel Engineering Ltd. and anr. 2005(9) Scale 1” referred to above. It is clear from the provisions of Section 2(e) of the Act that in order that a Judicial authority can be termed as Court for the purpose of the Act it must be shown that the relevant Judicial authority is the principle Court of original Civil Jurisdiction. Reading of the Judgment of the Supreme Court in the case of “Patel

Engineering Ltd.” referred to above shows that the Supreme Court has held that the power exercised by the authority to which application under Section 11 of the Act can be made is Judicial power and not administration power and therefore, the order made by that authority is a Judicial order. The question whether the authority exercising power under Section 11 of the Act is a Court within the meaning of the Act or not was neither raised in that case nor has it been decided by the Supreme Court. The submission of the learned Counsel for the petitioner that though the question was not raised before the Supreme Court the observations made in the majority Judgment of the Supreme Court support his contention, has no substance, in my opinion, the observations of the Supreme Court in paragraph 12, 14 and 17 which are quoted below indicate exactly to the contrary.

> “12. It is common ground that the Act has adopted the UNCITRAL Model Law on International Commercial Arbitration. But at the same time, it has made some departures from the model law. Section 11 is in the place of Article 11 of the Model Law. The Model Law provides for the making of a

request under Article 11 to “the court or other authority specified in Article 6 to take the necessary measure”. The words in Section 11 of the Act, are “the Chief Justice or the person or institution designated by him”. The fact that instead of the court, the powers are conferred on the Chief Justice, has to be appreciated in the context of the statute. “Court” is defined in the Act to be the principal Civil Court of original jurisdiction of the district and includes the High Court in exercise of its ordinary original civil jurisdiction. The principal civil court of original jurisdiction is normally the District Court. The High Courts in India exercising ordinary original civil jurisdiction are not too many. So in most of the States the concerned court would be the District Court. Obviously, the Parliament did not want to confer the power on the District Court, to entertain a request for appointing an arbitrator or for constituting an arbitral tribunal under Section 11 of the Act. It has to be noted that under Section 9 of the Act, the District Court or the High Court exercising

original jurisdiction, has the power to make interim orders prior to, during or even post arbitration. It has also the power to entertain a challenge to the award that may ultimately be made. The framers of the statute must certainly be taken to have been conscious of the definition of 'court' in the Act. It is easily possible to contemplate that they did not want the power under Section 11 to be conferred on the District Court or the High Court exercising original jurisdiction. The intention apparently was to confer the power on the highest judicial authority in the State and in the country, on Chief Justices of High Courts and on the Chief Justice of India. Such a provision is necessarily intended to add the greatest credibility to the arbitral process. The argument that the power thus conferred on the Chief Justice could not even be delegated to any other Judge of the High Court or of the Supreme Court, stands negatived only because of the power given to designate another. The intention of the legislature appears to be clear that it wanted to ensure that the power under Section 11(6) of the Act was exercised

by the highest judicial authority in the concerned State or in the country. This is to ensure the utmost authority to the process of constituting the arbitral tribunal.”

14. Normally a persona designata cannot delegate his power to another. Here, the Chief Justice of the High Court or the Chief Justice of India is given the power to designate another to exercise the power conferred on him under Section 11(6) of the Act. If the power is a judicial power, it is obvious that the power could be conferred only on a judicial authority and in this case, logically on another Judge of the High Court or on a Judge of the Supreme Court. It is logical to consider the conferment of the power on the Chief Justice of the High Court and on the Chief Justice of India as presiding Judges of the High Court and the Supreme Court and the exercise of the power so conferred, is exercise of judicial power/authority as presiding Judges of the respective courts. Replacing of the word 'court' in the Model Law with the expression “Chief Justice” in the Act, appears to be more

for excluding the exercise of power by the District Court and by the court as an entity leading to obvious consequences in the matter of the procedure to be followed and the rights of appeal governing the matter. The departure from Article 11 of the Model Law and the use of the expression “Chief Justice” cannot be taken to exclude the theory of its being an adjudication under Section 11 of the Act by a judicial authority.

17. It is true that the power under Section 11(6) of the Act is not conferred on the Supreme Court or on the High Court, but it is conferred on the Chief Justice of India or the Chief Justice of the High Court. One possible reason for specifying the authority as the Chief Justice, could be that if it were merely the conferment of the power on the High Court, or the Supreme Court, the matter would be governed by the normal procedure of that Court, including the right of appeal and the Parliament obviously wanted to avoid that situation, since one of the objects was to restrict the interference by Courts

> in the arbitral process. Therefore, the power was conferred on the highest judicial authority in the country and in the State in their capacities as Chief Justices. They have been conferred the power of the right to pass an order contemplated by Section 11 of the Act. We have already seen that it is not possible to envisage that the power is conferred on the Chief Justice as persona designata. Therefore, the fact that the power is conferred on the Chief Justice, and not on the court presided over by him is not sufficient to hold that the power thus conferred is merely an administrative power and is not a judicial power."

According to the provisions of Section 2(e) of the Act District Court is the principal Court of original civil jurisdiction in a district, but the Supreme Court by its judgment in the case of "M/s.Patel Engineering Ltd. & another" totally excluded district Judge from the proceedings under Section 11 of the Act. In my opinion, the authority designated by Section 11 of the Act as competent to exercise power

under this provision can not be termed as the court for the purpose of the Act though now the Supreme Court has held that the power exercised by that authority is a Judicial power. Therefore, the application made by the petitioner under Section 11 of the Act is totally irrelevant so far as the provisions of Section 42 of the Act are concerned, because the application contemplated by Section 42 of the Act is an application made to the Court and to a Judicial authority which is not a Court of original civil Jurisdiction.

5. The application made by the respondent before the Baroda Court is filed under Section 9 of the Act, in so far as that application is concerned, following can be taken as undisputed positions:-

(a) That the application has been filed by the respondent under Section 9 of the Act.

(b) That an application under Section 9 of the Act can be made to a 'Court' and that the Baroda Court to whom the application has been made is a 'Court'

within the meaning of the Act.

(c) That the award was made on 31.3.2005 and was communicated on 6.4.2005.

(d) That the application before the Baroda Court was filed on 5.5.2005, under Section 9 of the Act for directing the petitioner to deposit the amount awarded to the respondent by the Award or in the alternative security.

(e) That present petition was filed in the Court on 29.6.2005.

(f) That till 29.6.2005 neither the respondent nor the Baroda Court informed the petitioner that on 5.5.2005 application under Section 9 of the Act has been filed.

(g) That the period of three months provided by Section 34 of the Act for filing petition under that provision expired on 7.7.2005.

(h) That the petitioner got knowledge that application under Section 9 of the Act has been filed by the respondent because he was served with the notice from the Baroda

Court either on 14.7.2005 or on 20.7.2005.

The submission of the petitioner is that the provisions of Section 42 of the Act should be so interpreted that they can not be used by the party in whose favour an award has been made to deny the party who is aggrieved by the Award, the remedy provided by the Act for challenging the Award. Reading of the provisions of Section 42 of the Act shows that in case where more than one Court has the jurisdiction over the subject matter of the arbitration, the Court which is moved first in point of time becomes entitled to exercise jurisdiction to the exclusion of all other courts in relation to that arbitration. In other words, when more than one Court has jurisdiction in relation to the subject matter of arbitration, the parties to the arbitration have choice of moving any of those Courts, but if one of the parties moves one of those Courts, because of the provisions of Section 42 of the Act, the other parties lose their entitlement to move the other Court or Courts who otherwise have the jurisdiction. Thus, the provisions of Section 42 of the Act have

drastic consequences. Considering that the provisions have drastic consequences, it will have to be so construed that it is not misused by a party to deny the remedies created by the Act to the other party. The object for which the provision has been incorporated is that once an application is filed in a particular Court that Court and no other Court will entertain the subsequent applications. The provisions is enacted to avoid conflict and scramble.

6. It is Section 34 of the Act which incorporates the provision for challenge to arbitral Award. Sub-section (3) of Section 34 of the Act lays down the period of limitation for making an application under Section 34 of the Act challenging the Award. Sub-section (3) of Section 34 of the Act reads as under:-

> "(3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the arbitral award or, if a request had been made under section 33, from the date on which that request had been disposed of by the arbitral

> tribunal:
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> Provided that if the Court is satisfied that the applicant was prevented by sufficient cause from making the application within the said period of three months it may entertain the application within a further period of thirty days, but not thereafter."

Perusal of the above quoted provision of sub-section (3) of Section 34 of the Act shows that the petition under Section 34 of the Act challenging the Award can be filed within a period of three months from the date of the receipt of the award by the party concerned. It further shows that if a petition challenging the Award is not filed within a period of three months from the date of receipt of the Award then it can be filed within a period of 30 days after expiry of the period of three months, provided the petitioner satisfies the Court that he was prevented by sufficient cause from making the application earlier. The above quoted provision further shows that no power is vested in the Court to condone delay in excess of 30 days in filing petition under Section 34 of the Act. The Division Bench of this Court by

its judgment in the case of “H.M.P.Engineers Ltd. and others. Vs. Ralies India Ltd. and others, 2003(4) Mh.L.J. 931” has laid it down as a Law relying on some of the judgments of the Supreme Court that the provisions of Section 4 to 24 of the Limitation Act do not apply to a petition filed under Section 34 of the Act. Paragraphs 12 and 13 of that judgment are relevant, which read as under:-

> “12. In the light of the above discussion we are of the view that the learned single Judge was not right in holding that the provisions of Section 14 which provide for exclusion of the period are not excluded by the scheme of the 1996 Act. In Pushpa P. Mulchandani Vs. Admiral Radhakrishin Tahilani upon examination of the decisions in the filed Srikrishna,J. has clearly held that notwithstanding that the 1996 Act contains no specific words of exclusion, an examination of the scheme of the Act would suggest that the intention is to exclude the application of the provisions of sections 4 to 24 of the Limitation Act. We are in respectful agreement with the

> view expressed in the case of Pushpa P.Mulchandani. We may also mention that though the decision in Popular Construction Company is rendered after the decision in Pushpa P.Mulchandani's case, the conclusions in Pushpa P.Mulchandani's case are fully supported by the decision in Popular Construction Company's case. It is impossible to subscribe to the view taken by the learned Single Judge that the law laid down in Pushpa P.Mulchandani's case is no longer a good law in view of the decision in the case of Popular Construction Company.
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> 13. For all these reasons we have come to the conclusion that the provisions of section 14 of the Limitation Act,1963 do not govern the filing of petition under section 34 of the 1996 Act and in this view, it is unnecessary to deal with the other contentions raised in the appeal."

Thus, as a result of this judgment of the Division Bench, now if a petition under Section 34 of the Act is not filed before the Court which is competent to entertain it within a period of three months then save and except the power of that Court to condone

delay of a maximum period of 30 days for sufficient cause being shown, the remedy of filing petition under Section 34 of the Act is permanently lost. In other words a petitioner who has filed the petition under some mistaken belief in some other Court cannot withdraw the petition and file it in the Court having jurisdiction and seek exclusion of time spent in prosecuting the petition in the earlier Court. That could have been done by the petitioner had section 14 of the Limitation Act been applicable but since the Division Bench has held that Section 14 of the Act does not apply, therefore, in a case where more than one Court is competent to entertain the petition under Section 34 of the Act challenging the Award, a petitioner not being aware of any application filed previously by the other party to the Award in any other Court chooses one Court to file his petition under Section 34 and after expiry of period of limitation provided by Section 34 of the Act it is revealed that the Court where he has filed the petition is not competent to entertain his petition because the other party had previously moved an application before some other Court which was also

having jurisdiction then his application before the Court where he has filed it, is not maintainable because of Section 42 of the Act and he will not be able to move the other Court which will have the jurisdiction because of section 42 of the Act because the period of limitation has expired and the provisions of the Limitation Act providing for exclusion of time spent in bonafide prosecuting the proceedings in some other Court do not apply. Thus, one party to the Arbitration can easily and conveniently by filing an application in one Court and keeping that fact to itself, deny the remedy under Section 34 of the Act permanently to the other party against whom the Award is made. In this situation therefore, in my opinion, the learned Counsel appearing for the petitioner is right in submitting that for the purpose of Section 42 of the Act only that application can be termed as a bonafide application of which the notice is given by the applicant promptly to the other side so that the other side can take an informed decision about the future course of action to be followed by the other side. Considering the provision of Section 42 of the

Act it appears that the application contemplated by Section 42 of the Act which has the result of ousting the jurisdiction of the other Court is an application which is a bonafide application. If a Court comes to the conclusion that the previous application on the basis of which jurisdiction of the Court is to be ousted is not a bonafide application then filing of that application will not operate to oust the jurisdiction of the Court. The provision of Section 42 of the Act can be misused by a litigant to deny remedy provided by the Law to the other party. Holding that the previous application contemplated by Section 42 of the Act should be a bonafide application would not amount to addition of any words to the provisions. If an application is filed under the provisions contained in Part I of the Act merely with the intention to gain unfair advantage over the other side, that application cannot be said to be a bonafide application. In other words in case a party shows that the other party had filed and prosecuted the application with malafide intention to deny the other side a remedy created by Statute, the Court would be justified in ignoring that application. It

is a fundamental rule that if a person is to be deprived of a remedy available to him or his interest is to be adversely affected in any way then he should be told about it and he should be given a fair opportunity. The person concerned is entitled to notice. Notice means information, intended to apprise a person of some proceeding in which his interests are involved, or informing him of some fact which it is his right to know and the duty of the other person to notify. A person has a right to be notified of any proceedings connected with the subject matter in which he has an interest. The Supreme Court in its judgment in the case of “Joseph and another Vs. Batho Mary and others, (1999)5 Supreme Court Cases 711” has considered this situation. In that case two sets of persons had put forward rival claims of tenancy over land admeasuring 1.20 acres and had applied for certificate of purchase under the relevant Law. In the proceedings filed by the persons who were appellants before the Supreme Court the other set of persons got themselves joined as parties. While those proceedings were pending the other set of persons who had got themselves joined to the proceedings moved an

application before the Land Tribunal showing that the land owners have agreed to allow them to purchase right, title and interest of the land owners in respect of a part of the land which was subject matter of the dispute. The Appellants before the Supreme Court who have originally filed an application were not made parties to that application and they were at no point of time informed about the application made and the order was secured from the Land Tribunal in relation to the part of the land. That order was challenged by filing Civil Suit by the appellants before the Supreme Court, as the order vitiates by fraud. In the Civil Suit that order was set aside by the Trial Court. The appeal Court confirmed the decree. In the Second Appeal however, the High Court has set aside the decree passed by the Trial Court which was confirmed by the Appeal Court. In this background the Supreme Court found that the conduct of the defendants in the Civil Suit of making subsequent application before the Land Tribunal and obtaining order therein keeping the appellants completely in dark about those proceedings amounts to fraud and it vitiates the order passed in the Civil

Suit. The observation of the Supreme Court in paragraph 6 and 7 of the Judgment are relevant. They read as under:-

> “6. Be that as it may, the crucial point is not that. The most crucial aspect in this case is the admitted premise that the appellants were kept in complete darkness about the joint applications when they chose to file OA No.1810 of 1971. Even the Land Tribunal was kept in the dark that another application for the same land was filed by the appellants and which was hotly contested by the contesting respondents.
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> “7. Learned Single Judge had not disputed the proposition that when fraud is established the appellants have a right to institute a suit for a declaratory decree that the resultant order is vitiated and is therefore a nullity. At any rate the binding legal position on that score in the State of Kerala was based on the decision of the High Court in Velappan V. Thomas. Though a reference to the said decision was made by the learned Single Judge in the impugned judgment, its correctness has not been doubted.”

It is clear from the observations of the Supreme Court that institution of any proceedings is likely to be adversely affected the interest of a person then that person is entitled to inform about the institution of those proceedings before his interest gets permanently prejudiced. In my opinion, therefore, in order to examine whether the jurisdiction of this Court to entertain the present petition stands ousted because of filing of application under Section 9 of the Act before the Baroda Court, I will have to consider the case of the petitioner that the application was filed in the Baroda Court with malafide intention to deny the petitioner the remedy of filing petition under Section 34 of the Act against the Award. On behalf of the petitioner it is submitted that after the Award was communicated on 6.4.2005, the respondent filed an application under Section 9 of the Act on 5.5.2005. The respondent did not inform the petitioner that he has filed an application under Section 9 of the Act in the Baroda Court. According to the petitioner, the conduct of the respondent of filing application

in the Baroda Court and keeping that information to himself shows that the application was filed by the respondent with malafide intention. Though it is an admitted position that the respondent after filing petition did not intimate to the petitioner that he had filed an application under Section 9 of the Act before the Baroda Court, according to the respondent immediately after filing petition before the Baroda Court he paid process charges for serving notice of that application on the petitioner. According to the respondent, the conduct of the respondent of paying process charges so that the Baroda Court could issue notice to the petitioner of the application filed under Section 9 of the Act by the respondent shows that the respondent had done everything within his power to intimate the petitioner about filing of petition under Section 9 of the Act by the respondent. In my opinion, it cannot be said that merely because the respondent paid process charges in the Court he did everything within his power to intimate the petitioner that he has filed an application under Section 9 of the Act. Considering that the act of the respondent of filing an

application under Section 9 of the Act in the Baroda Court has drastic consequences and on that depends the jurisdiction of the Court to entertain the petition filed under Section 34 of the Act, in my opinion, it was the duty of the respondent to intimate independently of the Court to the petitioner immediately that he has filed an application under Section 9 of the Act, so that the petitioner could have either filed his petition before the Baroda Court or could have moved the Baroda Court for appropriate orders. It was also urged on behalf of the respondent that though the petitioner had filed petition in this Court on 29.6.2005, he received notice from the Baroda Court on 14.7.2005, though by 14.7.2005 the period of three months provided by Sub-section (3) of Section 34 of the Act for filing petition under Section 34 of the Act was over, the petitioner could have withdrawn his petition filed in this Court immediately and filed it before the Baroda Court and should have applied for condonation of delay, because the period of 30 days after the expiry of period of three months from the date of communication of the Award was not over. In my

opinion, this submission has also no force, because by 14.7.2005 the period of limitation provided under sub-section (3) of Section 34 of the Act was over and therefore, the petitioner could have filed his petition before the Baroda court only by seeking condonation of delay in filing the petition. The order of condonation of delay in filing the petition is in the discretion of the Court and therefore, in my opinion, it does not lie in the mouth of the respondent who created this situation to claim that the petitioner should have withdrawn his petition filed in this Court and could have filed it before the Baroda Court by seeking condonation of delay. In my opinion, considering the consequence that an application filed under Part I of the Act has in view of the provision of Section 42 of the Act the Court will have to read a duty in the applicant who files the application to intimate the other side about the fact of having filed the application at the earliest opportunity. Whether intimation has been given by the applicant at an appropriate time, so that it can be said that the applicant has discharged his duty, would be a question of fact, to be decided in each

case, on the basis of the facts and circumstances of each case. If there is failure to perform this duty then the Court will be justified in assuming that filing of application is not bonafide and is malafide. In so far as the present case is concerned, it cannot be said that the respondent could not have filed the application under Section 9 of the Act before the Baroda Court because it is nobodies case that the Baroda Court did not have jurisdiction. But after having filed the application, considering the provisions of Section 42 and 34(3) of the Act, the respondent, had the application been filed with the bonafide intention to secure an order under Section 9 of the Act and not with the malafide intention to use the fact of filing the application to deny the statutory remedy under Section 34 of the Act to the petitioner, the respondent would have immediately, independently of paying process charges in the Baroda Court, informed the petitioner that it has filed the application before the Baroda Court. The only reason given by the respondent before me for not doing so is that there is no duty on the respondent under the law to give any such information to the petitioner. In

the circumstances therefore, in my opinion, it has to be held that the application under Section 9 of the Act before the Baroda Court was filed by the respondent with malafide intention and was not a bonafide application, and therefore, filing of that application before the Baroda Court does not oust the jurisdiction of this Court to entertain the petition because of the provisions of Section 42 of the Act.

7. It is next urged that the application filed under Section 9 of the Act by the respondent before the Baroda Court is not an application with respect to the arbitration agreement between the parties. It is submitted that the application under section 9 of the Act has been filed by the petitioner not with respect to the arbitration agreement but for enforcement of the Award. Perusal of Section 9 of the Act shows that it lays down that a party can before or during the arbitral proceedings move the Court for interim measures. It further shows that a party can move the Court for interim measures even after the Award is made but before it has become enforceable. In support of the submission that the application

made under Section 9 of the Act by the applicant is an application for enforcement of the Award and not in respect of the arbitration agreement, the petitioner has relied on the judgment of the Supreme Court in the case of “Kamal Pushpa Enterprises” referred to above. In that case the question that the Supreme Court was considering was whether the provisions of Section 69 of the Partnership Act would stand in the way of an unregistered firm from defending the proceedings against it or it precludes only initiation of proceedings by such an unregistered firm. In that case the proceedings under the Arbitration Act,1940 were initiated against an unregistered partnership firm. Ultimately the Award was made in favour of that firm. That Award was challenged before the Court and before the Court the unregistered partnership firm was seeking an order for making that Award rule of the Court. It was contended before the Supreme Court that the unregistered partnership firm cannot defend the proceedings in which the arbitral Award in its favour is challenged and it also cannot initiate proceedings before the Court for making that Award rule of the

Court. The Supreme Court in this background in paragraph 9 of its judgment has observed thus:-

> “9. The prohibition contained in Section 69 is in respect of instituting a proceeding to enforce a right arising from a contract in any Court by an unregistered firm, and it had no application to the proceedings before an Arbitrator and that too when the reference to the Arbitrator was at the instance of the appellant itself. If the said bar en-grafted in Section 69 is absolute in its terms and is destructive of any and every right arising under the contract itself and not confined merely to enforcement of a right arising from a contract by an unregistered firm by instituting a suit or other proceedings in Court only, it would become a jurisdictional issue in respect of the Arbitrator's power, authority and competency itself, undermining thereby the legal efficacy of the very award, and consequently furnish a ground by itself to challenge the award when it is sought to be made a rule of Court. The case before us cannot be said to be one such and the

learned counsel for the appellant though was fully conscious of this fact, yet tried to assert that it is open to the appellant to take up the objection based upon Section 69 of the Partnership Act, at any stage – even during the post-award proceedings to enforce the award passed. The Award in this case cannot either rightly or legitimately said to be vitiated on account of the prohibition contained in Section 69 of the Partnership Act,1932 since the same has no application to proceedings before an Arbitrator. At the stage of enforcement of the award by passing a decree in terms thereof what is enforced is the award itself which crystallise the rights of parties under the Indian Contract Act and the general law to be paid for the work executed and not any right arising only from the objectionable contract. It is useful in this connection to refer to the decision of this Court in Satish Kumar v. Surinder Kumar, AIR 1970 SC 833 wherein it has been stated in unmistakable terms that an Award is not a mere waste paper but does create rights and has some legal effect besides being final and binding on the

> parties. It has also been held that the award is, in fact, a final adjudication of a Court of the parties' own choice and until impeached upon sufficient grounds in an appropriate proceedings, an award which is on the face of it regular, is conclusive upon the merits of the controversy submitted for arbitration. Consequently, the post-award proceedings cannot be considered by any means, to be a suit or other proceedings to enforce any rights arising under a contract. All the more so when, as in this case, at all stages the respondent was only on the defence and has not itself instituted any proceedings to enforce any rights of the nature prohibited under Section 69 of the Partnership Act, before any Court as such. We see no infirmity or error whatsoever in the decision of the Courts below to call for our interference in this appeal. The appeal fails and shall stand dismissed."

Perusal of the above quoted paragraph shows that the Supreme Court has held that after the Award is passed when the proceedings are taken up for enforcing that

Award, those proceedings cannot be termed as proceedings for enforcing the agreement between the parties. What is sought to be enforced is the Award made by the Arbitrator and not the contract between the parties. It is, however, to be noted here that the contract which is referred to by the Supreme Court in paragraph 9 of the judgment quoted above is a contract under which the dispute between the parties had arisen. The Supreme Court in that case was not considering the case where the arbitration agreement is contained in the partnership deed which is not registered. In that case the Supreme Court was considering the case of the contract entered into between a third party and the unregistered partnership firm. In my opinion, the words used in Section 42 of the Act “with respect to arbitration agreement” are wide enough to apply also in a case where application is filed under section 9 either for deposit of the amount awarded by the Award of the Arbitrator or for security for the amount awarded by the arbitrator. The award of which enforcement is sought is also made because of the arbitration agreement.

8. In any case as I have held that because the respondent did not inform the petitioner about filing of Section 9 Petition before the Baroda Court before expiry of the period of limitation provided by Section 34(3) of the Act for filing application under Section 34 of the Act, the conduct of the respondent of filing an application cannot be termed as bonafide and therefore, the fact of filing of that application will not oust the jurisdiction of this Court because of Section 42 of the Act to entertain the petition, in my opinion, it is not necessary to examine the submission of the petitioner based on the judgment in the case of “Kamal Pushpa Enterprises” any further.

9. It was also urged on behalf of the petitioner that considering the definition of the term “Court” appearing in section 2(e) of the Act as no part of cause of action has arisen within the jurisdiction of this Court, this Court will not have jurisdiction to entertain the petition. Perusal of Section 2(e) of the Act quoted above shows that to find out whether this Court will have jurisdiction to

entertain the petition, I will have to consider the question if instead of taking up arbitration proceedings a civil suit had been filed on the subject matter of the arbitration, whether that Civil suit could have been entertained by this Court. Before the Arbitrator, the respondent was the claimant, therefore, if the claimant instead of taking up arbitration proceedings had filed a civil suit on the subject matter of the arbitration proceedings the question to be considered is whether he could have filed the suit in this Court. Answer to that question would be in affirmative because in the suit that could have been filed by the respondent/claimant, the present petitioner would have been the defendant and the defendant/ the petitioner carries on business within the jurisdiction of this Court and therefore, in terms of clause 12 of the Letters Patent the suit filed by the claimant on the subject matter of the arbitration in this Court against the petitioner was maintainable in this Court. It was submitted on behalf of the respondent that the question that this Court will have to consider is had the petitioner filed a civil

suit whether that suit would have been maintainable before this Court or not? According to the respondent because no part of cause of action arises within the jurisdiction of this Court and the respondent also does not carry on business within the jurisdiction of this Court, this Court will not have jurisdiction to entertain the suit. In my opinion, the submission is not well founded. The proper approach, would be to make an inquiry, if the party which has invoked the arbitration clause and is a claimant, had filed a Civil Suit on the subject matter of arbitration, which Court or Courts will have the jurisdiction to entertain the suit in accordance with the Law ? If suit filed by the claimant could have been entertained by the Court then that court will be the Court within the meaning of Section 2(e) of the Act. In the present case had the respondent decided to file civil suit instead of invoking the arbitration clause, its suit could have been entertained by this Court, if filed here, because the petitioner who would have been defendant in that suit carry on business within the jurisdiction of this Court. Therefore, in my opinion, the respondent is not right

in contending that this Court will not have jurisdiction to entertain the petition because no part of cause of action has arisen within the jurisdiction of this Court and because the respondent also does not carry on business within the jurisdiction of this Court. The objections raised to the maintainability of the petition are thus rejected. I hold that this Court has jurisdiction to entertain the petition.

10. The next question that is to be considered is whether the constitution of arbitral tribunal is in accordance with the law and the arbitration clause. The arbitration clause reads as under:-

> “If any dispute arises between IEL and PPCL, each one shall make reference to the Arbitration of such dispute as cannot be mutually resolved. Both parties will nominate/appoint one arbitrator each and an Umpire to be appointed by the two arbitrators, when one party shall fail to appoint an arbitrator after due notice, the arbitrator nominated/appointed by the

> other party shall act as sole arbitrator. Such reference shall be a submission to arbitration under the Indian Arbitration Act,1940, as amended to date."

The respondent by letter dated 26.2.2002 had raised several claims against the petitioner. By letter dated 13.4.2002 the respondent appointed Shri.Sanat V. Pandya as its Arbitrator. In that letter no time was fixed by the respondent within which the petitioner had to nominate their arbitrator. Thereafter, the respondent by letter dated 17.5.2002 claimed that as the petitioner had not yet appointed its arbitrator Shri.Sanat V. Pandya appointed by it as Arbitrator would act as sole arbitrator in terms of the arbitration clause. The said arbitrator Shri.Sanat V. Pandya by letter dated 21.5.2002 fixed the hearing of the matter on 20.6.2002. The petitioner by letter dated 15.6.2002 requested the arbitrator that the petitioner was in the process of appointing its nominee on the Arbitral Tribunal and therefore, the meeting fixed on 20.6.2002 should be postponed. The petitioner, thereafter, filed an

arbitration application bearing No.124 of 2002 under Section 11 of the Act before this Court claiming therein that after the respondent had appointed Mr.Sanat V.Pandya as its nominee on the Arbitral Tribunal by letter dated 17.6.2002 the petitioner had appointed its nominee on the Arbitral Tribunal and therefore, now the Court has to appoint third arbitrator. The Court decided the arbitration application no.124 of 2002. The Court did not pass any order on the validity or otherwise of the constitution of the Arbitral Tribunal as the Court found that Mr.Pandya has already assumed jurisdiction and as per the Judgment of the Supreme Court then holding the field, objection to the jurisdiction of the arbitrator was to be raised before the Arbitrator under Section 16 of the Act. The court left open the question as to the jurisdiction of Shri.Sanat V. Pandya to act as sole arbitrator. The petitioner therefore, appeared before Shri.Sanat V. Pandya and filed an objection under Section 16 of the Act contending that appointment of Shri.Pandya as Sole Arbitrator is contrary to Law and the arbitration clause. That objection was overruled by the

Arbitrator by his decision dated 23.6.2003. He held that failure of the petitioner to nominate its representative results in nominee of the respondent becoming the sole Arbitrator. Perusal of the arbitration clause quoted above shows that each party has to appoint its nominee on the Arbitral Tribunal and the two Arbitrators appointed by two parties then appoint the third Arbitrator. The arbitration clause further provides that if one of the two parties appoint an Arbitrator but the other party fails to appoint its Arbitrator after due notice, the Arbitrator appointed by first party can act as Sole Arbitrator. Without referring to any Law, if the matter is to be decided only on the construction of the above referred arbitration clause, it is clear that in order that failure of the other party results in the Arbitrator appointed by the first party becoming the sole Arbitrator, the failure to appoint should be after due notice by the first party to the other party. The term “due notice” used in the arbitration clause would indicate that the first party will have to indicate in the letter, whereby it informs the other party that it has appointed its

nominee on the Arbitral Tribunal, the time which is at the disposal of the other party for appointing its nominee. The arbitration clause itself does not specify any time within which the other party has to nominate its nominee on the Arbitral tribunal. Obviously, therefore, the appointment will have to be made by the other party within a reasonable time. Now what time can be termed as reasonable time will depend on the opinion of the parties. Therefore, minimum that can be said is that the party who is first appointing its nominee on the Arbitral Tribunal will have to indicate to the other party what period of time it considers as reasonable time for the other party to appoint its nominee on the Arbitral Tribunal. In my opinion, this will be the primary requirement. In case the first party does not indicate any time which it considers to be a reasonable time for the other party to appoint its nominee, it will be open to the other party to take its own time in appointing its nominee and till the other party appoints its nominee, the Arbitrator appointed by the first party will not become the sole Arbitrator. In the present case, admittedly, the

respondent did not indicate any time which it considers to be reasonable time for the petitioner to appoint its nominee on the Arbitral Tribunal, therefore, it cannot be said that the respondent had given due notice as contemplated by the arbitration clause to the petitioner to appoint its nominee on the Arbitral Tribunal failing which the nominee of the respondent would become the sole Arbitrator. It was submitted that in view of the provisions of Section 11 of the Act, there was obligation on the petitioner to nominate its representative on the Arbitral Tribunal within a period of 30 days from the date it receives letter from the respondent nominating its representative. Perusal of the provisions of Section 11 of the Act shows that so far as the case where the Arbitration clause contemplates appointment of three Arbitrators, failure of one of the parties to make appointment of its nominee on the Arbitral Tribunal within thirty days from the receipt of a request to do so from the other party results in the Chief Justice getting jurisdiction to appoint Arbitrator. The Supreme Court has considered this question in its judgment in the case “Datar

Switchgears Ltd. Vs. Tata Finance Ltd. and another, (2000)8 Supreme Court Cases 151". The observations made by the Supreme Court in paragraphs 19 and 23 are relevant. They read as under:-

> "19. So far as cases falling under Section 11(6) are concerned – such as the one before us no time limit has been prescribed under the Act, whereas a period of 30 days has been prescribed under Section 11(4) and Section 11(5) of the Act. In our view, therefore, so far as Section 11(6) is concerned, if one party demands the opposite party to appoint an arbitrator, and the opposite party does not make an appointment within 30 days of the demand, the right to appointment does not get automatically forfeited after expiry of 30 days. If the opposite party makes an appointment even after 30 days of the demand, but before the first party has moved the court under Section 11, that would be sufficient. In other words, in cases arising under Section 11(6), if the opposite party has not made an appointment within 30 days of demand, the right to make appointment is not forfeited but continues, but an appointment has to be made before the

> former files application under Section 11 seeking appointment of an arbitrator. Only then the right of the opposite party ceases. We do not, therefore, agree with the observation in the above judgments that if the appointment is not made within 30 days of demand, the right to appoint an arbitrator under Section 11(6) is forfeited.
>
> 23. When parties have entered into a contract and settled on a procedure, due importance has to be given to such procedure. Even though rigor of the doctrine of "freedom of contract" has been whittled down by various labour and social welfare legislation, still the court has to respect the terms of the contract entered into by parties and endeavour to give importance and effect to it. When the party has not disputed the arbitration clause, normally he is bound by it and obliged to comply with the procedure laid down under the said clause."

It is thus, clear that Mr.Sanat Pandya was not justified in assuming the jurisdiction merely because

within 30 days the petitioner did not appoint its nominee on the Arbitral Tribunal. Thus, I do not see any force in the contention that because the petitioner failed to nominate its nominee on the Arbitral Tribunal within thirty days, the nominee of the respondent becomes the sole Arbitrator. The assumption of jurisdiction by the Sole Arbitrator, in my opinion, is not only in contravention of the provisions of the arbitration clause, but it is also contrary to the provisions of Section 11 of the Act. It is sub-section (1) to Sub-section (6) of Section 11 of the Act which are relevant for the present purpose. They read as under:-

> “11. Appointment of arbitrators
>
> (1) A person of any nationality may be an arbitrator, unless otherwise agreed by the parties.
>
> (2) Subject to sub-section (6), the parties are free to agree on a procedure for appointing the arbitrator or arbitrators.
>
> (3) Failing any agreement referred to in sub-section (2), in an arbitration with three arbitrators,

each party shall appoint one arbitrator, and the two appointed arbitrators shall appoint the third arbitrator who shall act as the presiding arbitrator.

(4) If the appointment procedure in sub-section (3) applies and -

(a) a party fails to appoint an arbitrator within thirty days from the receipt of a request to do so from the other party; or

(b) the two appointed arbitrators fail to agree on the third arbitrator within thirty days from the date of their appointment,

the appointment shall be made, upon request of a party, by the Chief Justice or any person or institution designated by him.

(5) Failing any agreement referred to in sub-section (2), in an arbitration with a sole arbitrator, if the parties fail to agree on the arbitrator within thirty days from receipt of a request by one party from the other party to so agree the appointment shall be made, upon request

> of a party, by the Chief Justice or any person or institution designated by him.
>
> (6) Where, under an appointment procedure agreed upon by the parties, -
>
> (a) a party fails to act as required under that procedure; or
>
> (b) the parties, or the two appointed arbitrators, fail to reach an agreement expected of them under that procedure; or
>
> (c) a person, including an institution, fails to perform any function entrusted to him or it under that procedure,
>
> a party may request the Chief Justice or any person or institution designated by him to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment."

The provision which entitles parties to agree on the procedure for appointment of arbitrator is sub-section (2) of Section 11 of the Act, but that provision is subject to the provisions of sub -section (6). Therefore, the provisions of sub-

section (6) of Section 11 of the Act have overriding effect over the provisions of sub-section (2) and the procedure agreed between the parties pursuant to the provisions of sub-section (2) of Section 11 of the Act is subject to the provisions of sub-section(6). Perusal of the provisions of sub-section (6) of Section 11 of the Act shows that if a party fails to act as required under the procedure agreed between the parties, in other wards if a party under the procedure agreed between the parties is under an obligation to appoint its nominee on the Arbitral Tribunal but fails to do so then under Section 11 of the Act, the Chief Justice gets jurisdiction to appoint an Arbitrator. Perusal of the provisions of sub-section (3) of Section 11 of the Act shows that sub-section (3) of Section 11 of the Act applies where the parties have not agreed to a procedure for appointment of Arbitrator, and sub-section (4) of Section 11 of the Act applies in case where sub-section (3) of Section 11 of the Act applies and even under those provisions on failure of a party to appoint its nominee on the Arbitral Tribunal it is the Chief Justice who gets jurisdiction to make

appointment and in no case the Arbitrator appointed by one party can assume jurisdiction as sole Arbitrator. To my mind, thus, it is clear that in no case in the facts and circumstances of this case Mr.Sanat Pandya could have assumed jurisdiction as sole Arbitrator. The act of Mr.Pandya of assuming jurisdiction as sole arbitrator was patently illegal, it was not only contrary to the arbitration clause but was also contrary to the provisions of Section 11 of the Act. Mr.Pandya therefore, had no jurisdiction to make the award. It appears that because the respondent was aware of the patent illegality of the action of Shri.Pandya and therefore, the respondent was so anxious to deny to the petitioner the remedy for challenging the Award made by Shri.Pandya. Because except stopping scrutiny of the award made by Mr.Pandya by the Court, the respondent had no other means to keep the award in tact. As I find that the constitution of Arbitral Tribunal was contrary to the arbitration clause and the Law, the Award made by the sole Arbitrator is liable to be set aside for that reason, I do not propose to go into the other grounds which are raised on behalf of the petitioner for

challenging the Award. In the result therefore, the petition succeeds and is allowed. The Award impugned in the petition is set aside. The respondent is directed to pay cost of this petition to the petitioner as incurred by the petitioner.